DUPLICATE

RECEIVED

APR 30 1991

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of	)	
	)	
GAF BROADCASTING COMPANY, INC.	)	File No.
	)	
For Renewal of License For	)	
FM Radio Station WNCN, New York, New York	)	

TO: The Commission

PETITION TO DENY

Morton L. Berfield
Roy W. Boyce

Cohen and Berfield, P.C.
1129 20th Street, N.W., Suite 507
Washington, DC 20036
(202) 466-8565

Attorneys for Class Entertainment & Communications, L.P.

Date: April 30, 1991

TABLE OF CONTENTS

SUMMARY

Class Entertainment & Communications, L.P. (Class) herein petitions to deny the renewal application of GAF Broadcasting Company, Inc. (GBC) for FM broadcast station WNCN, New York, New York. Class is filing simultaneously herewith a timely competing application for that facility.

A recent appellate court decision reversing and remanding the criminal convictions of GBC's parent and a principal thereof for violating federal securities and anti-fraud laws does not serve to eliminate issues as to GBC's qualifications previously raised by Class. The decision rather serves to clarify the existence of issues that must be considered by this Commission pursuant to Section 309 of the Act.

The decision has no impact on issues as to GBC's candor concerning the criminal proceeding previously raised by Class. It rather serves to heighten concern as to the candor of GBC's performance to date.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of	)	
	)	
GAF BROADCASTING COMPANY, INC.	)	File No.
	)	
For Renewal of License For FM Radio Station WNCN, New York, New York	)	

TO: The Commission

PETITION TO DENY

Class Entertainment & Communications, L.P. (Class), by its attorneys, hereby petitions that the above-referenced application for renewal of license of GAF Broadcasting Company, Inc. (GBC) for FM radio station WNCN, New York, New York be denied or designated for hearing on the issues hereinafter specified.

I. The Interest of Class

Class previously demonstrated and documented its interest in the WNCN license in its Petition to Require Filing of Early Renewal Application filed May 18, 1990 (the Petition). The only change is that Class is filing simultaneously herewith a timely competing application for the facilities of WNCN (which may be officially noted) and is thus clearly a party in interest. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (Ashbacker).

II. Issues Are Warranted Based On Misconduct by GBC's Parent And Resulting Lack of Candor By GBC

Serious charges of misconduct have been raised concerning GBC's parent GAF Corporation (GAF) and James

T. Sherwin, an officer and director of GAF (until October 1990) and GBC (until December 1989). Moreover, GBC's conduct before the Commission concerning these matters raised serious issues as to GBC's candor. These matters are fully addressed in Class' Petition; its June 19, 1990 Reply to Opposition to Petition To Require Filing of Early Renewal Application (Reply); and its February 1, 1991 Reply To Response To Commission Staff Letter dated December 19, 1990. Except as modified by the following discussion, those pleadings remain pertinent and are incorporated herein by reference.

At the time of the foregoing pleadings, the misconduct at issue had resulted in a criminal conviction of GAF and Sherwin in the United States District Court for the Southern District of New York. The jury found GAF and Sherwin guilty of violating federal securities and anti-fraud laws. On March 18, 1991, the United States Court of Appeals for the Second Circuit reversed the convictions and remanded the matter. Attached hereto as Attachment No. 1 is a copy of the decision as submitted by GBC on March 21, 1991.

As reflected in the Court's decision, the circumstances of the case involved two instances of stock trading, referenced as the October trades and the November trades. Originally, the indictment had encompassed both sets of trades. The evidence concerning the

November trades, however, was less clear as to whether those trades were attributable to GAF and Sherwin. At a second trial in the matter (the first having ended in a mistrial), the defendants urged that reasonable doubt as to their involvement in the November trades also served to create a reasonable doubt as to their involvement in the October trades. Decision at p. 10-11. The second trial ended when the jury was unable to reach a verdict. In the third trial, the Government limited its indictment to the October trades. The trial judge excluded evidence of the Government's prior attempts to prosecute on the November trades and denied a requested jury instruction that the November trades would be relevant to assessing the October trades. The Second Circuit held that both rulings were in error and in combination denied the defendants a fair trial.

It is no doubt the position of GBC that the Court's decision wholly eliminates all questions arising from this matter, based on the Character Policy Statement, 102 FCC 2d 1179, 59 RR 2d 801 (1986) (Character I) modified 5 FCC Rcd 3252, 67 RR 2d 1107 (1990) (Character II). Such a conclusion cannot be justified pursuant thereto or pursuant to the underlying statutory mandate of Section 309(e) of the Communications Act of 1934, as amended (the Act).

A. The Misconduct

As noted, the underlying statutory test which must be met is Section 309(e) of the Act. This requires that a matter be set for hearing if "a substantial and material question of fact is presented or the Commission for any reason is unable to make" the requisite finding pursuant to Section 309(a) of the Act that the grant of the application would serve "the public interest, convenience, and necessity..." Certainly, the Commission may generally define through policy statements such as Character the broad contours of the public interest; however, this cannot obviate the need to carefully review the particular facts of each case in light of the underlying statutory test, especially where the policy statement does not directly address or resolve those particular facts.

Character I establishes a policy pursuant to which what is defined as relevant "non-FCC misconduct" will be considered only pursuant to an adjudication by an "appropriate trier of fact..." 59 RR 2d at 819. It is subject to two rather vaguely framed exceptions relating to "egregious" and "flagrant" violations. 59 RR 2d at 819 n. 60, 61. Further the adjudication may be considered notwithstanding the pendency of an appeal, the significance of which depend on issues vaguely defined by reference to FR Evid. 609(e). 59 RR 2d at 820 and n. 63.

Character I had limited the Commission's concern to specified types of misconduct. The universe was subsequently expanded to include drug violations. Drug Trafficking Policy, 4 FCC Rcd 7533, 66 RR 2d 1617 (1989). Character II further extended it to all felonies and, potentially, serious misdemeanors.

As the facts now stand, an adjudication has been made by a trier of fact. It is true that this adjudication has been reversed; however, the reversal is on a very narrow basis that obviously arises from the burden placed on the Government in the criminal context to prove a defendant's guilt beyond a reasonable doubt. The same result might not have occurred in a civil or administrative proceeding subject to a lesser standard of proof. It would be irrational for the Commission to wholly ignore the judgment reached by the trier of fact based on a narrow error that relates to a burden of proof that would not apply to Commission adjudications.

The Court's decision does serve to clarify the nature of the issues and their relevance for the

> found by looking at the November trades. They argued that since the evidence suggested that Jefferies, rather than Sherwin, was responsible for the November trades, and since the two series of trades were virtually identical, and linked, the jury should have examined the November trades in determining who was responsible for the October trades."

Jefferies had testified that the October trades resulted from telephone instructions from Sherwin. Decision, p. 6. The testimony concerning Sherwin's involvement in the November trades is less certain. Decision, p. 8. The underlying issue, therefore, is the credibility of Jefferies' testimony concerning the October trades and the explicit or implicit denial thereof by GAF and Sherwin.

The issue thus involves two areas of non-broadcast misconduct that are of concern to the Commission even under the limited universe indicated in Character I. The underlying misconduct at issue clearly involves fraud also involving the violation of Federal law (Decision at p. 3-4), which is of direct concern to the Commission pursuant to Character I. 59 RR 2d at 813-14, para. 37.

Jefferies' testimony as stated at p. 6 of the Decision also raises substantial questions as to the possible involvement in the misconduct of GAF and GBC controlling principal Samuel J. Heyman. Thus, testimony by Jefferies indicated that, shortly prior to the call from Sherwin, Jefferies received a call from Heyman telling him to expect the call from Sherwin. As has been discussed in Class' prior pleadings, the Government viewed Heyman as an unindicted co-conspirator, to which GBC has been consistently evasive. See p. 4 of Class' Reply and p. 9-10 of Reply of Listeners Guild, Inc. to

action to be filed by the Securities and Exchange Commission based on the same matters, including a payment by GAF of $1.25 million plus interest "by way of disgorgement." GBC March 12, 1990 Supplement at p. 2. Character I indicates that a consent decree "by itself" will not be considered. 59 RR 2d at 820 n. 64. The instant agreement, however, is characterized as a "settlement" rather than a consent decree. Moreover, even if treated as analogous, it clearly does not stand "by itself". It cannot be ignored when viewed as one aspect of the totality of circumstances surrounding this matter.

The Commission's traditional reluctance to intrude into questions of violations of other laws reflects its concern that it is not the appropriate agency to determine whether a violation of such laws occurred. Sumiton Broadcasting Co., Inc., 15 FCC 2d 410, 14 RR 2d 970 (Rev. Bd. 1968). Here, however, the proper agencies have clearly determined that such violations did occur, including both the SEC and the Department of Justice, which has pursued the matter through at least three criminal trials. The jury in the last of these trials found that violations occurred. The Court's decision does not dispute that violations would be established if Jefferies' testimony is accepted. Its remand reflects only a concern that the jury did not have all the information necessary to properly assess the credibility of that testimony in light of the high burden of proof applicable in a criminal proceeding. GAF chose to incur

a substantial penalty rather than defend itself in a civil proceeding involving a lesser burden of proof where liberal discovery would be available.

The fraudulent conduct at issue would clearly raise

It should be emphasized that under Section 309 of the Act, the Commission must initially assume the truth of the factual allegations made by Class for the purpose of determining whether they would raise a prima facie inconsistency with the public interest. Astroline Communications Co. v. FCC, 857 F. 2d 1556, 65 RR 2d 538, 541-42 (D.C. Cir. 1988). Here, it must assume the truth of Jefferies' sworn testimony and must accept the Court's decision that such testimony, if true, would establish the pertinent violations. The prima facie inconsistency of the facts viewed in that light is evident. The Commission must next view the facts in light of all other information available to it for the purpose of making an ultimate judgment as to the existence of sufficient doubt to warrant a hearing. In so doing, it cannot require the petitioner to have fully proved its case. Thus, the petitioner need only show a great deal of smoke not necessarily the existence of fire itself. Heretofore, however, GBC has never provided the Commission with facts concerning these matters that could be weighed against Class' prima facie case.

Finally, Character II suggests that Commission inquiry can be avoided by conditioning a grant on the outcome of an ongoing proceeding. 67 RR 2d at 1108. Whatever the merits of this practice in a non-comparative case, it is clearly unacceptable in the comparative context. Pursuant to Ashbacker, all material questions of fact must be resolved prior to any grant of one of the

competing applications. This is particularly so given that these questions would not be meaningfully resolved even if a fourth trial were held and resulted in an acquittal, given the fundamentally different purpose and scope of a licensing proceeding and a criminal proceeding. An acquittal in any further trial would only reflect that the Government had failed to prove beyond a

also RKO, 50 RR 2d at 837-38. Here, any deception was clearly material at the time it occurred.

Here, GBC represented in an amendment to pending applications filed July 27, 1988 under the signature of Heyman that GAF, Sherwin and Heyman personally were "confident of complete vindication" with respect to the criminal charges. Attachment 11 of Class' Petition. The Court's Decision makes clear that if Jefferies' testimony recounted at p. 6 thereof is true, GAF and Sherwin are clearly guilty of criminal violations. There is thus a clear conflict between the sworn testimony of Jefferies and the representation made by GBC to this Commission on July 27, 1988, which has never been amended. This conflict can only be resolved at hearing.

The Court in RKO made clear the broad scope of a licensee's affirmative duty to fully disclose all pertinent facts. 50 RR 2d at 839. As developed in prior pleadings of Class and the Guild, GBC has consistently refused to meet this obligation in connection with its presentations relating to the criminal proceeding. For instance, in light of the Court's decision, candor clearly requires that GBC affirmatively and specifically admit or deny under oath (with any necessary explanation) the sworn testimony of Jefferies reflected in the decision. Anything less amounts to deception and concealment.

Finally, the Court's decision clearly reinforces questions as to GBC's candor in light of its consistent

refusal to make disclosure as to Heyman's role in the misconduct. This issue was first raised in a Supplement to Petition for Reconsideration filed by the Guild on March 31, 1989, was raised by Class, and was most recently reiterated in the Guild Reply filed almost two years later. GBC has consistently failed to provide a meaningful response to an issue that is clearly crucial in light of the testimony reflected in the decision, which raises a substantial and material question as to direct involvement by Heyman. As noted at p. 9 of Class' Petition, GBC responded to the Guild's initial raising of this matter by attacking the Guild's counsel and effectively denying any wrongdoing. The sworn testimony of Jefferies clearly raises facts that conflict with this claim which conflict must be resolved at hearing.

Class pointed out in its Petition that GBC had followed the same "policy of minimal disclosure" that resulted in the disqualification at issue in RKO. RKO General, Inc. (WNAC-TV), 78 FCC 2d 1, 47 RR 2d 921, 999 (1980). The sworn testimony of Jefferies recounted in the Court's decision raises further questions as to whether GBC's performance has been affirmatively misleading.

III. Issues Requested

There accordingly exist substantial questions that warrant inquiry at hearing. The issues are:

1. To determine the effect on the qualifications of GAF Broadcasting Company, Inc. (GBC) to be a Commission licensee of alleged violations of federal securities and anti-fraud laws involving related persons and entities, including whether GBC controlling principal Samuel J. Heyman participated in any such misconduct.

2. To determine whether GBC misrepresented facts, was lacking in candor, was grossly negligent or violated Section 1.65 of the Rules in connection with the disclosure of facts concerning a criminal proceeding involving a related person and entity.

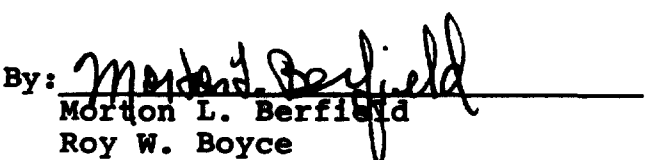
As noted at p. 13 of Class' Petition, Class also supports the inquiries sought by the Guild in a Petition For Reconsideration filed December 14, 1988 in connection with BTCH-880322GF et al.

IV. Conclusion

Wherefore this Petition should be granted.

Respectfully submitted,

CLASS ENTERTAINMENT & COMMUNICATIONS, L.P.

By: 

Morton L. Berfield
Roy W. Boyce
Cohen and Berfield, P.C.
1129 20th Street, N.W., Suite 507
Washington, DC 20036
(202) 466-8565

Its Attorneys

Date: April 30, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 444 & 445 August Term 1990

(Argued Nov. 26, 1990 Decided March 18, 1991)

Docket Nos. 90-1352, 1353

UNITED STATES OF AMERICA,

Appellee,

V.

GAF CORPORATION, GAF CHEMICALS CORPORATION, JAY & COMPANY, INC., JAMES T. SHERWIN,

Defendants,

GAF CORPORATION, JAMES T. SHERWIN

Appellants.

Before:

Altimari and Mahoney, Circuit Judges, and Daly, District Judge[1]

GAF Corporation ("GAF") and James T. Sherwin ("Sherwin") appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on March 30, 1990 after a trial held before the Honorable Mary Johnson Lowe, United States District Judge, and a jury. The jury found the defendants guilty of conspiring to violate the federal securities and anti-fraud laws, of price manipulation of the common stock of Union Carbide Corporation ("Union Carbide") from

[1]The Honorable T. F. Gilroy Daly, United States District Judge for the District of Connecticut, sitting by designation.

October 1, 1986 through November 10, 1986, of securities fraud for manipulative purchases of Union Carbide stock on October 29, 1986, and October 30, 1986, of wire fraud, and of aiding and abetting the making and maintaining of false books and records by a securities broker-dealer.

Reversed and remanded for a new trial.

ARTHUR L. LIMAN, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY (Max Gitter, John N. Gevertz, Laura Farina, Paul, Weiss, Rifkind, Wharton & Garrison, of counsel), and David E. Nachman, Esq. New York, NY, for Defendant-Appellant GAF Corporation.

STEPHEN E. KAUFMAN, ESQ., P.C., New York, NY and Kronish, Lieb, Weiner & Hellman, New York, NY (Alan Levine, William J. Schwartz, Cindi R. Brandt, Kronish, Lieb, Weiner & Hellman, of counsel) for Defendant-Appellant James T. Sherwin.

ROGER S. HAYES, Acting United States Attorney for the Southern District of New York (Carl H. Lowenson, Jr., Kevin R. Czinger, Daniel Richman, Assistant United States Attorneys, New York, NY, of counsel), for Appellee.

Daly, District Judge,

INTRODUCTION

Three trials have been started in this matter. The verdicts here appealed came at the conclusion of the third trial, which began November 13, 1989, and lasted five weeks before Judge Lowe and a jury. Although appellants have presented various issues for our consideration in their consolidated appeal, our primary concerns relate to the effect of the government's amendment of its bill of particulars, the trial court's ruling on the defendants' request that the original bill be admitted into evidence for comparison, the government's rebuttal summation concerning the subject of the amendment, and the trial court's ruling on the defendants' request for an instruction concerning the chief defense theory, which was integrally related to the amendment and the government's rebuttal summation.

GAF and Sherwin appeal from judgments convicting them of conspiring to violate the federal securities and anti-fraud laws, in violation of 18 U.S.C. § 371, price manipulation of the common stock of Union Carbide Corporation from October 1, 1986 through November 10, 1986, in violation of 15 U.S.C §§ 78i(a)(2), 78ff, and 18 U.S.C § 2, securities fraud for the manipulative purchases of Union Carbide stock on October 29, 1986, and October 30, 1986, in violation of 15 U.S.C §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2, wire fraud, in

making and maintaining of false books and records by a securities broker-dealer, in violation of 15 U.S.C §§ 78q(a), 78ff, 17 C.F.R. §§ 240.17a-3, 240.17a-4, and 18 U.S.C § 2. The court sentenced Sherwin to concurrent six-month terms of imprisonment to be followed by concurrent one-year terms of probation. The court also imposed a mandatory $50 special assessment on each count of which he was convicted, for a total assessment of $400. GAF was fined $250,000 on each each count, for a total fine of $2 million, and the court also imposed a $50 special assessment on each count, for a total assessment of $400.

The defendants' chief contention at both the second and third trials was that evidence indicated that Boyd Jefferies, the founder of Jefferies & Company, rather than Sherwin, was responsible for unlawful trades taking place in November, 1986, that the government believed originally that these trades were linked to the trades for which Sherwin was ultimately convicted, and so noted in its original bill of particulars, and that since there was reasonable doubt concerning who was responsible for the November trades, there must be reasonable doubt concerning who was responsible for the trades which were the subject of the third trial.

We hold that the unusual history and circumstances of this case required that the court admit into evidence the original bill of particulars for the jury's comparison, and that the court give an instruction similar to that requested concerning

the defendants' theory of the case. Because the court refused to admit the original bill into evidence, and refused to give the requested instruction, we believe that the chief defense theory was not fairly presented to the jury. Accordingly, as discussed below, we reverse the judgments of conviction and remand this case to the district court for a new trial.

DISCUSSION

1. FACTS

After an unsuccessful tender offer for Union Carbide in December 1985, GAF held nearly 10% of Union Carbide's common stock, or approximately 10 million shares. Shortly after October 2, 1986, GAF decided to solicit bids for the possible sale of some or all of its Union Carbide block, and assigned Sherwin, GAF's Vice-Chairman, to oversee this process. Sherwin solicited bids from the then-leading block traders in the nation, including Jefferies & Company. The block bids which GAF received were generally a fraction of a point lower than publicly-quoted market prices.

The government's evidence indicated that the market price for Union Carbide stock had declined from a high of $25 1/2 per share in April 1986 to a low of $20 per share on October 7, 1986. Although the price of Union Carbide began a recovery in mid-October, on October 28, 1986, it closed at a price ($21 7/8 per share) lower than the day before for the first time since October 7, 1986. That same day, market information indicated a large supply of Union Carbide stock available for sale below

$22.

According to Boyd Jefferies, who testified for the government, GAF's Chairman Samuel Heyman called him in mid-October to tell him to expect a call from Sherwin. Jefferies testified that Sherwin called later that day to inquire whether Jefferies, if so asked, could make Union Carbide stock close at a particular price or higher for several days in a row. Jefferies testified that he replied affirmatively, and that Sherwin assured him that GAF would guarantee Jefferies against any loss. Jefferies testified that he then informed James Melton, Jefferies & Company's chief trader, of the substance of this conversation, and that Melton should do whatever Sherwin asked if Sherwin called while he was out of the office.

Jefferies further testified that on October 29, 1986, Sherwin called him, indicated that he wanted to proceed with their plan, and asked if Jefferies could close Union Carbide at $22 or higher that day. Jefferies responded affirmatively, and then called Melton in Los Angeles, where he was based, to relay the request.

The evidence indicates that on October 29, 1986, shortly

Union Carbide stock at $22 per share. The exchange "specialist" in Union Carbide then executed three "market on the close" orders at $22. Union Carbide closed on October 29, 1986 at $22 per share.

After the close of the New York Stock Exchange, Melton purchased 8000 shares of Union Carbide stock on the Pacific Stock Exchange at $22 per share.

On October 30, 1986, Union Carbide traded at below $22 per share until Melton again intervened. He instructed his broker to purchase 27,100 shares at $21 7/8 in a series of trades from 3:34 P.M. until 3:53 p.m. Then, in the last two trades of the day in Union Carbide, Melton, through his broker, purchased 10,000 shares at $22 1/8. Union Carbide stock closed on October 30, 1986 at $22 1/8 per share.

Melton then purchased all of the shares on the Pacific Stock Exchange that were available at $22 1/4 (1500), and another 1500 shares at $22 3/8.

On November 3, 1986, Melton sold a small number of Union Carbide shares at a time so as not to "oversize" the market by increasing the supply of stock too rapidly. Melton "aggressively" sold the remainder of the Union Carbide stock on November 4, 1986 at lower and lower prices as the market reacted (at first adversely) to news of a recapitalization program by Union Carbide. These trades resulted in a loss for Jefferies & Company.

On November 6 and 7, 1986, Jefferies & Company purchased

20,500 Union Carbide shares. As in October, the shares were placed in Jefferies & Company's "802" account -- the "house" account. Also, as in October, the purchases were made shortly before the close of trading, and shares were purchased on both exchanges. The purchases also had the effect of slightly increasing Union Carbide's closing price -- this time to just over $23 per share. Jefferies & Company sold these shares on November 10-12, 1986 without suffering a loss.

Melton, called by the government, testified that Sherwin never asked him to manipulate the price of Union Carbide stock, and that on October 29, and 30, as well as on November 3, and 4, and November 6, and 7, he acted pursuant to Jefferies' specific instructions.

Jefferies acknowledged that in his original statement to the government he had stated that he had effectuated the November 6, and 7, 1986 trades in order to "make back" the losses Jefferies & Company has sustained when it sold Union Carbide stock on November 3, and 4, 1986. At trial, however, although aknowledging that his story had changed, Jefferies testified that he personally had no responsibility for the November trades. He contended that he was told by Melton that Sherwin had asked Melton to make the November purchases. Melton denied ever receiving such a request, or making such statements.

2. PROCEDURAL HISTORY

Indictment 88 Cr. 415, filed on July 6, 1988, contained ten